FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 31 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,
Appellant,
v.
TOWN OF McCORMICK, SOUTH CAROLINA,
Appellee.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF IN SUPPORT THEREOF

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
DOROTHY KENYON, *Counsel.*

MONROE LAZERE,
CLIFFORD FORSTER,
of New York City,
Of Counsel.

INDEX

PAGE

Motion For Leave to File Brief as Amicus Curiae i

Brief of Amicus Curiae

Statement 1

I. A license tax ordinance applied to the sale or distribution of religious literature by religious colporteurs is unconstitutional 2

A. The ordinance in effect imposes a tax upon knowledge 2

B. The ordinance is a tax upon the exercise of rights established by the federal constitution 4

II. It is submitted that where literature is sold, the determination as to whether the activity falls within the ambit of constitutional protection should turn on whether the vendor is primarily a salesman or primarily a propagandist 8

Conclusion 11

Table of Cases

Binns *v.* Vitagraph Co., 210 N. Y. 51 (1913) 9

Colyer *v.* Fox Publishing Co., 162 App. Div. 297 (2d Dept. 1914) 9

Cox *v.* New Hampshire, 312 U. S. 569 5

PAGE

Davis *v.* Massachusetts, 167 U. S. 43 5

Grosjean *v.* American Press Co., 297 U. S. 233 ..... 4, 7

Hague *v.* CIO, 307 U. S. 496 ..... 2, 5

Humiston *v.* Universal Film Manufacturing Co., 189 App. Div. 467 (1st Dept. 1919) 9

Jamison *v.* Texas, 318 U. S. 413 ..... 5, 10

Largent *v.* Texas, 87 L. Ed. 627 3

Lovell *v.* Griffin, 303 U. S. 444 ..... 2, 7

Martin *v.* New Metropolitan Fiction Inc., 237 App. Div. (3d Dept. 1932) 9

Murdock *v.* Pennsylvania, 87 L. Ed. 827 ..... 1, 3, 4, 6, 7, 8, 11

Sidis *v.* F-R Pub. Corp., 34 F. Supp. 19, affd. 113 F. (2d) 806, cert. den. 311 U. S. 711 9

Valentine *v.* Chrestensen, 316 U. S. 52 7

Statute

N. Y. Civil Rights Law, Sec. 51 8

Authorities

Chafee, Freedom of Speech in The United States (1941) 2

11 Fordham Law Review 304 (1942) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,
Appellant,

v.

TOWN OF McCORMICK, SOUTH CAROLINA,
Appellee.

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the appellant, to the filing of this brief has been obtained. Attorney for the appellee has refused to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

Dated January 31, 1944.

DOROTHY KENYON,
Counsel for American Civil Liberties Union,
As Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,
Appellant,
v.
TOWN OF McCORMICK, SOUTH CAROLINA,
Appellee.

APPEAL FROM SUPREME COURT OF SOUTH CAROLINA

BRIEF OF *AMICUS CURIAE*

Statement

The American Civil Liberties Union whose aims, functions, and status are well-known to this Honorable Court has asked leave to file a brief *amicus curiae* on the argument of this appeal because it believes that important principles of civil liberties are here involved. To permit the decision of the South Carolina Supreme Court to stand, would in our opinion constitute a considerable limitation to the doctrines enunciated by this Court in the various literature distribution cases decided heretofore. No subtle legislative attempt nor dialectic evasion of *Murdock v. Pennsylvania*, 87 L. Ed. 827, should be countenanced in the application, meaning, and extent of that case.

The only substantial question here is whether a religious colporteur whose entire time is devoted to and whose sole source of income is derived from the sale of religious books which form the credo and are the interpretation of his religious views is engaged in commerce so as to make him liable to the provisions of a general license tax ordinance. This is not the case of whether a person who operates a book shop and sells books should pay a license tax, even though the books express ideas with which the bookseller is sympathetic. In the present case at least the issue is clear.

I. A license tax ordinance applied to the sale or distribution of religious literature by religious colporteurs is unconstitutional.

A. The ordinance in effect imposes a tax upon knowledge.

1. The distribution of circulars is an exercise of the right of free speech. *Lovell* v. *Griffin*, 303 U. S. 444. It would be difficult to overemphasize the importance of this type of activity in preserving our free institutions. The language of the brief *amicus curiae* filed by the Bill of Rights Committee of the American Bar Association in *Hague* v. *CIO*, 307 U. S. 496, and quoted with approval in Chafee, *Freedom of Speech in The United States* (1941), at page 417, has application here with equal force:

> "We desire to stress the importance of open-air meetings as a means of public discussion and education. * * * It is true that the press continues as a major vehicle of public discussion and that the new medium of radio occupies a large part of the field. Yet it is also true that the open-air meeting still fills a major role, and is indispensable in giving free public debate its traditional scope."
>
> * * * * * * *

> "The outdoor meeting is especially well adapted to the promotion of unpopular causes, since such causes are likely to command little financial support and therefore must often be promoted by persons who do not have the financial means to 'hire a hall' or purchase time on the radio."

This Court has transposed this thought into terms applicable to the case at bar, for it has recognized that religious tracts are distributed in order to educate and enlighten those the colporteur believes are living in ignorance of the Truth.

> "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation."

Murdock v. *Pennsylvania*, 87 L. Ed. 827, 829.

2. The type of activity revealed by the record is the distribution of books and circulars both gratuitously and in return for a contribution or consideration. This aspect of the activities of Jehovah's Witnesses has been previously observed by this Court.

> "The Witnesses look upon their work as Christian and charitable. To them it is not selling books or papers but accepting contributions to further the work in which they are engaged."

Largent v. *Texas*, 87 L. Ed. 627, 628.

A flat tax on the privilege of so distributing literature must necessarily reduce the quantity of literature which the appellant can distribute without requiring a monetary return. Such a tax, therefore, is virtually a tax on circulation. And hence, the prohibition of *Grosjean* v. *American Press Co.*, 297 U. S. 233, at page 668, becomes applicable:

> "This court had occasion in Near *v.* Minnesota, supra (283 U. S. 713 et seq., 75 L. ed. 1366, 51 S. Ct. 625), to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant 'principally although not exclusively, immunity from previous restraints or [from] censorship.'"

And again:

> "The taxes' imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. Grosjean *v.* American Press Co. supra (297 U. S. pp. 244-249, 80 L. ed. 665-668, 56 S. Ct. 444). They may indeed operate even more subtly."
>
> *Murdock* v. *Pennsylvania*, 87 L. Ed. 827, 833.

B. The ordinance is a tax upon the exercise of rights established by the federal constitution.

1. It is submitted that the oversimplified description of the appellant's activities as "book selling" obscures the

manner in which the tax infringes upon his exercise of freedom of speech and of religion. Where the litigated activity involves elements of ordinary business enterprise and elements of the exercise of constitutional liberties, the use of the normal language of property and commerce is unfortunate. For such language overlooks an important aspect of the case, the conflict between the state's interest in regulating or taxing business, and the individual's constitutional rights.

This point is illustrated by the cases involving the conflict between the state's interest in regulating traffic on its streets, and the individual's constitutional rights of free speech and assembly. In *Davis* v. *Massachusetts*, 167 U. S. 43, the analysis was made in terms of property rights. Subsequent refinements in the determination of such conflicts appear to have abandoned the property terminology in favor of language importing a balance of interests between state and individual. State licensing of the use of public streets for parades and assemblies is now permissible only if the licensor is not vested with "arbitrary power or unfettered discretion." (*Cox* v. *New Hampshire*, 312 U. S. 569; *Hague* v. *CIO*, 307 U. S. 496; *Jamison* v. *Texas*, 318 U. S. 413; and see note 11 Fordham L. R. 304 (1942).

In the instant case, the appellant's activities involve an exercise of his religion, for it appears to be the petitioner's religion to propagandize for his cause. Reworded, therefore, the question becomes: Is a person propagandizing for a cause subject to a license tax on the ground that he sustains himself by the sale of his propaganda?

This Court has refused to classify with ordinary business enterprises, the type of activity here revealed.

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

Murdock v. *Pennsylvania*, 87 L. Ed. 827, 833.

2. That the appellant earned a livelihood in such activities, and that the appellant was a resident of the township seeking to impose the tax are immaterial. The use of the language of commerce must not be permitted to obscure the fundamental fact that the appellant's activity is primarily an exercise of the rights of freedom of speech and freedom of religion.

> "But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however mis-

guided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses *or to sustain him.* Freedom of speech, freedom of religion are available to all, not merely to those who can pay their own way." (Italics ours.)

Murdock v. *Pennsylvania,* 87 L. Ed. 827, 831.

3. It is submitted that whether the appellant earns a livelihood by virtue of his activities is not an appropriate test of whether the appellant is engaged in either a commercial activity or in the exercise of a constitutional right.

(a) Literature may be distributed without charge and yet the activity may be appropriately labeled commercial. *Valentine* v. *Chrestensen,* 316 U. S. 52.

(b) A distributor hired by a political candidate to distribute free circulars advertising the candidate's record clearly could not be considered subject to an occupational tax. See *Lovell* v. *Griffin, supra.*

(c) The business aspect of newspaper publishing subjects it to some business taxes, but the constitutional liberty aspects of the same activity immunize it from other types of taxes. *Grosjean* v. *American Press, supra.*

(d) And religious colporteurs are clearly within the constitutional protection of freedom of speech and of religion. *Murdock* v. *Pennsylvania, supra.*

4. And since the rights of freedom of speech and of religion are not granted by the state, the state cannot tax the exercise thereof, merely on the ground that the appellant is a resident of the state.

"It is claimed, however, that the ultimate question in determining the constitutionality of this license

tax is whether the state has given something for which it can ask a return. That principle has wide applicability. State Tax Commission *v.* Aldrich, 316 U. S. 174, L. ed. 1358, 62 S. Ct. 1008, 139 A. L. R. 1436, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal constitution."

Murdock v. *Pennsylvania*, 87 L. Ed. 827, 833.

II. It is submitted that where literature is sold, the determination as to whether the activity falls within the ambit of constitutional protection should turn on whether the vendor is primarily a salesman or primarily a propagandist.

A. The test should be: Are the sales concomitant with the propagandizing or is the vendor's sympathy with the contents of the literature sold incidental to the sale? *Is the vendor primarily selling a commodity or an idea?*

Such a test may prove difficult of application in particular cases, but the distinction is vital. Propagandists of unpopular causes must somehow sustain themselves. Whether the money they collect as a result of their activities is labeled "contribution" or "consideration" is an academic problem in semantics. The fundamental fact remains that the propagandist's zeal impels him to pursue his course despite the inevitable realization that far better remuneration may be obtained by the sale of more popular works.

That such a test is workable is revealed by the experience of the courts of the State of New York in construing §51 of Civil Rights Law. This section reads:

> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

In the construction of this statute, the New York courts have held that where the particular publication is incidental to a legitimate interest in the subject matter, there is no cause of action under the statute, even though money is incidentally earned by such use. *Colyer* v. *Fox Publishing Co.*, 162 App. Div. 297 (2d Dept. 1914); *Humiston* v. *Universal Film Manufacturing Co.*, 189 App. Div. 467 (1st Dept. 1919); *Sidis* v. *F-R Pub. Corp.*, 34 F. Supp. 19, aff'd. 113 F. (2d) 806, cert. den. 311 U. S. 711.

Where, however, the publication is used primarily for purposes of advancing the sales of a product, rather than for its inherent interest, then there is a cause of action under the statute. *Binns* v. *Vitagraph Co.*, 210 N. Y. 51 (1913); *Martin* v. *New Metropolitan Fiction Inc.*, 237 App. Div. 863 (3d Dept. 1932).

This Court has already adopted half of the analogous tests applicable in the instant case.

> "The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have 'a civil appeal, or a

> moral platitude' appended. Valentine *v.* Chrestensen, 316 U. S. 52, 55, 86 L. Ed. 1262, 1265, 62 S. Ct. 920. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."
>
> *Jamison* v. *Texas*, 87 L. Ed. 629, 632.

In short, where literature is distributed *without consideration*, whether the activity is constitutionally protected turns on whether the distribution is made to advance a cause or to advance a commercial enterprise.

It remains for the Court to extend the test to the reverse side of the medallion—the case in which literature is *sold* pursuant to the advancing of an idea.

This Court has indicated its inclination in the direction of this test.

> "As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners 'sold' the literature. The Supreme Court of Iowa in State *v.* Mean, 230 Iowa 1217, 300 N. W. 523, described the selling activities of members of this same sect as 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.' And see State *v.* Meredith, 197 S. C. 351, 15 S. E. (2d) 678. People *v.* Barber, 289 N. Y. 378,

385, 386, 46 N. E. (2d) 329. That accurately summarizes the present record."

Murdock v. Pennsylvania, 87 L. Ed. 827, 831.

The instant case affords an opportunity to adopt the test.

CONCLUSION

The judgment of the Supreme Court of the State of South Carolina should be reversed.

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
DOROTHY KENYON, *Counsel*.

MONROE LAZERE,
CLIFFORD FORSTER,
of New York City,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 486.—October Term, 1943.

Lester Follett, Appellant,
vs.
Town of McCormick, South Carolina.
} Appeal from the Supreme Court of the State of South Carolina.

[March 27, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

Appellant was convicted of violating an ordinance of the town of McCormick, South Carolina which provided: ". . . the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina: Agents selling books, per day $1.00, per year $15.00." Appellant is a Jehovah's Witness and has been certified by the Watch Tower Bible & Tract Society as "an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus." He is a resident of McCormick, South Carolina, where he went from house to house distributing certain books. He obtained his living from the money received; he had no other source of income. He claimed that he merely offered the books for a "contribution". But there was evidence that he "offered to and did sell the books". Admittedly he had no license from the town and refused to obtain one. He moved for a directed verdict of not guilty at the close of the evidence, claiming that the ordinance restricted freedom of worship in violation of the First Amendment which the Fourteenth Amendment makes applicable to the States. The motion was overruled and appellant was found guilty by the jury in the Mayor's Court. That judgment was affirmed by the Circuit Court of General Sessions for McCormick County and then by the Supreme Court of South Carolina. — So. Car. —. The case is here on appeal. Judicial Code, § 237(a), 28 U. S. C. § 344(a).

The ordinance in this case is in all material respects the same as the ones involved in *Jones* v. *Opelika*, 319 U. S. 103, and *Murdock* v. *Pennsylvania*, 319 U. S. 105. In those cases, the tax imposed was also a license tax—"a flat tax imposed on the exercise

of a privilege granted by the Bill of Rights" and therefore an unconstitutional exaction. *Murdock* v. *Pennsylvania, supra,* p. 113. In those cases members of Jehovah's Witnesses had also been found guilty of "peddling" or "selling" literature within the meaning of the local ordinances. But since they were engaged in a "religious" rather than a "commercial" venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock* v. *Pennsylvania, supra,* p. 115. We emphasized that the "inherent vice and evil" of the flat license tax is that "it restrains in advance those constitutional liberties" and "inevitably tends to suppress their exercise." p. 114.

The Supreme Court of South Carolina recognized those principles but distinguished the present case from the *Murdock* and *Opelika* decisions. It pointed out that the appellant was not an itinerant but was a resident of the town where the canvassing took place, and that the principle of the *Murdock* decision was applicable only to itinerant preachers. It stated, moreover, that appellant earned his living "by the sale of books", that his "occupation was that of selling books and not that of colporteur", that "the sales proven were more commercial than religious." It concluded that the "license was required for the selling of books, not for the spreading of religion."[1]

We pointed out in the *Murdock* case that the distinction between "religious" activity and "purely commercial" activity would at times be "vital" in determining the constitutionality of flat license taxes such as these. 319 U. S. p. 110. But we need not determine here by what tests the existence of a "religion" or the "free exercise" thereof in the constitutional sense may be ascertained or measured. For the Supreme Court of South Carolina conceded that "the book in question[2] is a re-

[1] The court also distinguished State v. Meredith, 197 S. C. 351, where a license tax statute was construed to be inapplicable to an itinerant minister of Jehovah's Witnesses, the "sale" of literature being "merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion." p. 355.

[2] Though appellant distributed more than one tract or book, the only one before the Supreme Court of South Carolina was entitled "Children". As stated by that court, "Tested by the tenets of other forms of the Christian religion with which we are familiar, it is full of heresies. But it purports to offer a plan of salvation of the human soul in life after death . . . ."

ligious book"; and it concluded "without difficulty" that "its publication and distribution come within the words, 'exercise of religion', as they are used in the Constitution." We must accordingly accept as *bona fide* appellant's assertion that he was "preaching the gospel" by going "from house to house presenting the gospel of the kingdom in printed form." Thus we have quite a different case from that of a merchant who sells books at a stand or on the road.

The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional. It was not clear from the records in the *Opelika* and *Murdock* cases to what extent, if any, the Jehovah's Witnesses there involved were dependent on "sales" or "contributions" for a livelihood. But we did state that an "itinerant evangelist" did not become "a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him." 319 U. S. p. 111. Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a "free exercise" of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his function as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early "taxes on knowledge" which the framers of the First Amendment sought to outlaw. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-248. A preacher has no less a claim to that privilege when he is not an itinerant. We referred to the itinerant nature of the activity in the *Murdock* case merely in emphasis of the prohibitive character of the license tax as so applied. Its unconstitutionality was not dependent on that circumstance. The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean* v. *American Press Co.*, *supra*; *Murdock* v. *Pennsylvania*, *supra*) as the imposition of a censorship or a previous restraint. *Near* v. *Minnesota*, 283 U. S. 697. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania*, *supra*, p. 112.

But if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. For we fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker.

This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case, 319 U. S. p. 112. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

Reversed.

Mr. Justice REED, concurring.

My views on the constitutionality of ordinances of this type are set out at length in *Jones* v. *Opelika*, 316 U. S. 584, and in a dissent on the rehearing of the same case, 319 U. S. 117. These views remain unchanged but they are not in accord with those announced by the Court.

My understanding of this Court's opinions in *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Jones* v. *Opelika*, 319 U. S. 103, is that distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment and therefore immune from interference by the requirement of a license. These opinions are now the law of the land.

As I see no difference in respect to the exercise of religion between an itinerant distributor and one who remains in one general neighborhood or between one who is active part time and another who is active all of his time, there is no occasion for me to state again views already rejected by a majority of the Court. Consequently, I concur in the conclusion reached in the present case.

Mr. Justice MURPHY, concurring.

While I am in complete accord with the opinion of the Court, I desire to add a brief word in light of certain statements made in the dissenting opinion. It is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom.

It is suggested that we have opened the door to exemption of wealthy religious institutions, like Trinity Church in New York City, from the payment of taxes on property investments from which support is derived for religious activities. It is also charged that the decision contains startling implications with respect to freedom of speech and the press. I am neither disturbed nor impressed by these allegations. We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.

It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.

Separate opinion of Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice JACKSON.

The present decision extends the rule announced in *Jones* v. *Opelika*, 319 U. S. 103, and *Murdock* v. *Pennsylvania*, 319 U. S. 105.

The ordinance in question is not, in the words of the First Amendment, a law "prohibiting the free exercise" of religion. At the outset it should be observed that the ordinance is not discriminatory. It lays a tax on the pursuit of occupations by which persons earn their living in the Town of McCormick. It does not single out persons pursuing any given occupation and exempt others. If it were attacked as a denial of the equal protection of

the laws the contention would be frivolous.[1] There is no suggestion that the purpose is other than to raise revenue necessary for the support of government from all who enjoy the service and protection of government, and to adjust the tax laid on the appellant in the light of the aid he derives from such service and protection.

Secondly, the ordinance lays no onerous burden on the occupation of the appellant or any other citizen. The tax in question is wholly unlike that considered in *Grosjean* v. *American Press Co.*, 297 U. S. 233, which had the unmistakable purpose of hitting at one out of many occupations and hitting so hard as to discourage or suppress the pursuit of that calling. The court there said: (p. 250)

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."

What then is the law under attack? It is a revenue measure applying generally to those earning their living in the community. It is a monetary exaction reasonably related to the cost of maintaining society by governmental protection, which alone renders civil liberty attainable.

Follett is not made to pay a tax for the exercise of that which the First Amendment has relieved from taxation. He is made to pay for that for which all others similarly situated must pay,—an excise for the occupation of street vending. Follett asks exemption because street vending is, for him, also part of his religion. As a result, Follett will enjoy a subsidy for his religion. He will save the contribution for the cost of government which everyone else will have to pay.

The present decision extends and reaches beyond what was decided in *Murdock* v. *Pennsylvania, supra.* There the community asserted the right to subject transient preachers of religion to taxation; there the court emphasized the "itinerant" aspect of the activities sought to be subjected to the exaction. The emphasis there was upon the casual missionary appearances of Jehovah's Witnesses in the town and the injustice of subjecting them to a general license tax. Here, a citizen of the community, earning his living in the community by a religious activity, claims immunity

[1] Clark v. Titusville, 184 U. S. 329; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121; Bradley v. Richmond, 227 U. S. 477.

from contributing to the cost of the government under which he lives. The record shows appellant "testified that he obtained his living from the money received from those with whom he placed books, that he had no other source of income."

Unless the phrase "free exercise", embodied in the First Amendment, means that government must render service free to those who earn their living in a religious calling, no reason is apparent why the appellant, like every other earner in the community, should not contribute his share of the community's common burden of expense. In effect the decision grants not free exercise of religion, in the sense that such exercise shall not be hindered or limited, but, on the other hand, requires that the exercise of religion be subsidized. Trinity Church, owning great property in New York City, devotes the income to religious ends. Must it, therefore, be exempt from paying its fair share of the cost of government's protection of its property?

We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion it must equally grant a similar exemption to those who speak and to the press. It will not do to say that the Amendment, in the clause relating to religion, is couched in the imperative and, in the clause relating to freedom of speech and of press, is couched in the comparative. The Amendment's prohibitions are equally sweeping.[2] If exactions on the business or occupation of selling cannot be enforced against Jehovah's Witnesses they can no more be enforced against publishers or vendors of books, whether dealing with religion or other matters of information. The decision now rendered must mean that the guarantee of freedom of the press creates an immunity equal to that here upheld as to teaching or preaching religious doctrine. Thus the decision precludes non-oppressive, nondiscriminatory licensing or occupation taxes on publishers, and on news vendors as well, since, without the latter, the dissemination of views would be impossible. This court disavowed any such doctrine with respect to freedom of the press in *Grosjean v. American Press Co.*, *supra*, and it is unthinkable that those who publish and distribute for profit newspapers and periodicals should suggest that they are in a class apart, untouchable by taxation upon their enterprises for the support of the government which makes their activities possible.

[2] "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press"; . . . .

Not only must the court, if it is to be consistent, accord to dissemination of all opinion, religious or other, the same immunity, but, even in the field of religion alone, the implications of the present decision are startling. Multiple activities by which citizens earn their bread may, with equal propriety, be denominated an exercise of religion as may preaching or selling religious tracts. Certainly this court cannot say that one activity is the exercise of religion and the other is not. The materials for judicial distinction do not exist. It would be difficult to deny the claims of those who devote their lives to the healing of the sick, to the nursing of the disabled, to the betterment of social and economic conditions, and to a myriad other worthy objects, that their respective callings, albeit they earn their living by pursuing them, are, for them, the exercise of religion. Such a belief, however earnestly and honestly held, does not entitle the believers to be free of contribution to the cost of government, which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference.

We should affirm the judgment.